IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

AMBER ARD
AND JOHN DOES 1-10 PLAINTIFF

VS. CIVIL ACTION NO. 3:12cv2-TSL-JMR

STEVE RUSHING, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS
SHERIFF OF LINCOLN COUNTY, MISSISSIPPI;
TIM MILLER, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS JAILOR/DEPUTY OF
LINCOLN COUNTY, MISSISSIPPI; LINCOLN
COUNTY, MISSISSIPPI; AND JOHN DOES 1
THROUGH 10 DEFENDANTS

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Plaintiff, Amber Ard, by and through counsel, and files this her Memorandum of Authorities in Opposition to the Defendants' Motion for Summary Judgment [Docket No. 58], in this action, in accordance with Rule 7 of the *Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi*, and Rule 56 of the *Federal Rules of Civil Procedure*. As set forth below, based upon the facts and authorities controlling the adjudication of this civil action, genuine issues of material facts exist upon which a trial is warranted, pursuant to Rule 56(c) of the *Federal Rules of Civil Procedure*.

OVERVIEW

> Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.

Farmer v. Brennan, 511 U. S. 825, 834, 114 S. Ct. 1970 (1994).

> Sexual assault on an inmate by a guard, regardless of gender of the guard or of the prisoner, is deeply offensive to human dignity.

Stockman v. Lowndes County, 2000 WL 33907696 (N.D. Miss. 2000).

The formerly silent truth of rape in jails and prisons came to the forefront in 2003, when then President George W. Bush signed into law the *Prison Rape Elimination Act of 2003*, 42 U. S. C. Sections 15601, *et seq.*, which was equally applicable to local corrections facilities, such as the Lincoln County Jail, pursuant to 42 U. S. C. Section 15607. In doing so, the National Prison Rape Reduction Commission was established, pursuant to 42 U. S. C. Section 15606, and, in 2009 (before the events giving rise to the claims in this case), that Commission promulgated and published for all correction facilities, including federal, state and local authorities, standards to be adopted and enforced. [*See* Ex. "1" hereto, "Preventing and Responding to Corrections-Based Sexual Abuse: A Guide for Community Corrections Professionals," 2009, pages vi, 3.] Those standards ultimately were codified as regulations of the United States Department of Justice. 77 Fed. Reg.6248, 28 C. F. R. 115; 77 Fed. Reg 37106.

Thus, while the law of the land had long recognized that inmates, such as Amber Ard, were not to be raped, as the Defendants even admit, these statutes and regulations placed the onus and mandatory duty on local law enforcement officials, such as Sheriff Steve Rushing, and local governments, such as Lincoln County, of protecting inmates from being raped by corrections staff, as Deputy Timothy Miller admitted doing to Amber Ard on June 12, 2010.

Rushing and Lincoln County now seek to wholly avoid liability for the rape of Mrs. Ard, by straining incredulity in claiming, (1) they had a sign on a wall as a "policy"; (2) they did not know of any prior offenses by Miller; (3) the sex between Miller and Ard was "consensual"; (4) they fired Miller; (5) Miller knew there was a "policy"; (6) there was no "deliberate indifference"; and (7) they took purported steps to make sure female inmates were safe. As set forth below, these propositions by the Defendants are wholly insufficient to sustain their motion for summary judgment. In short, the Defendants knew of Miller's prior escapades; there cannot be consensual sex between guards and inmates; the sign is an insufficient and unenforced "policy"; Rushing himself knew of Miller's rape of an inmate in 2009; Rushing never disciplined Miller for the 2009 rape of an inmate; no objective actions or preventive measures were ever in effect to protect female inmates from Miller; Rushing and Lincoln County could have care less about guards having sex with female inmates; and the Sheriff, Lincoln County and Miller have blatantly violated Mississippi's sex offender laws.

Summary judgment must be denied, and a trial commenced in this matter.

THE CLAIMS

On November 23, 2011, the Plaintiff commenced this action against the Defendants, Steve Rushing, individually and in his official capacity as Sheriff of Lincoln County, Mississippi; Tim Miller, Individually and in his Official Capacity as Jailor/Deputy of Lincoln County, Mississippi; Lincoln County, Mississippi; and John Does 1 through 10. On August 30, 2012, this Court granted partial summary judgment as to qualified immunity against Rushing individually. Miller has never filed any disposition motions in this case. Therefore, all claims remain against Rushing officially, Lincoln County, and Miller.

On October 2, 2013, Defendants, Rushing and Lincoln County, filed their present Motion for Summary Judgment in this action. [Docket No. 58]

As this Court has already recognized in its Memorandum Opinion and Order of August 30, 2012, [Docket No. 33], the Plaintiff, through her prior counsel, had alleged violations the Fourth, Fifth and Fourteenth Amendments to the *United States Constitution*. [Docket No. 1, Counts 1 through 4.] However, as this Curt correctly points out, the claims are more properly couched in terms of the Eighth Amendment's prohibition against cruel and unusual punishment. [Docket No. 33, at page 5.] Nevertheless, it is not disputed by the Defendants, and this Court has already recognized, that Mrs. Ard has a clearly established constitutional right under the Eighth Amendment. [Docket No. 33, page 6.]

Undisputed Facts

The following facts cannot be disputed and have not been disputed:

1. On June 12, 2010, Amber Ard was raped by Defendant Miller.

2. Miller has admitted to violation of *Miss. Code Ann.* Section 97-3-104;

3. Miller is therefore a sex offender under *Miss. Code Ann.* Section 45-33-25, and he must register as a sex offender for twenty-five years under *Miss. Code Ann.* Section 45-33-47(2)(c)(i)(4).

4. Sheriff Rushing, as part of his oath, is specifically responsible for enforcement of the laws of the State of Mississippi and the *United States Constitution*, pursuant to *Miss. Code Ann.* Section 19-25-1.

5. Sheriff Rushing is duty-bound, by law, to have charge of the jail and to protect prisoners, under *Miss. Code Ann.* Section 19-25-69.

6. Neither Sheriff Rushing nor Lincoln County has specific training policies or manuals concerning the training of corrections officers at the Lincoln County Jail; only that Miller went to some training required by the State of Mississippi but which had nothing to do with the internal operations of the Lincoln County Jail.

7. Sheriff Rushing had no documents concerning prior sexual assaults by Miller.

8. Sheriff Rushing never disciplined Miller for any alleged prior sexual assaults on inmates.

9. Miller entered the female inmate cell block of the jail on June 10, 11 and 12, 2010, without being accompanied by a female corrections officer.

10. No female or other corrections officers or staff ever saw Miller enter the female inmate cell block of the jail, such that no such jailer can testify that Miller or the female inmate cell black was even being monitored on June 10, 11 or 12, 2010.

11. The Defendants did not have a written policy or manual of procedures prohibiting male corrections staff from entering the female inmate cell block without being accompanied, other than the purported sign on the wall.

12. The Defendants did not have any policy or procedure for female inmates to report incidents of male corrections staff entering the female inmate cell block unaccompanied.

13. The Defendants did not have a policy informing female inmates of their rights against being sexually assaulted by male corrections officers.

14. The cell, in which Amber Ard was housed, did not have any video security for her safety.

15. No evidence exists that the cell, in which Amber Ard was housed, had an intercom or other means o communicating with the jail's control room.

16. No female jailers were on duty prior to 6:45 on the mornings of June 10 or 11, 2010, when Miller previously entered Ard's cell alone. [*See* Docket No. 58-6, Ex. "A" time sheets attached to Rushing affidavit, Ex. 6 to Motion for Summary Judgment.]

17. Sheriff Rushing has never arrested Miller for violating *Miss. Code Ann.* Sections 97-3-104, 45-33-23, or 45-33-33(1)(a), as he is duty-bound under Section 45-33-33(3).

On these facts, and others set forth below, summary judgment must be denied in this case.

STANDARD OF THE MOTION

The *Federal Rules of Civil Procedure*, Rule 56(c) authorizes summary judgment where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). The existence of a material question of fact is itself a question of law that the district court is bound to consider before granting summary judgment. *John v. State of La. (Bd. of T. for State C. & U.)*, 757 F.2d 698, 712 (5th Cir. 1985).

A Judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). Although Rule 56 is peculiarly adapted to the disposition of legal questions, it is not limited to that role. *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986). The dispute must be genuine, and the facts must be material." *Id.* "With regard to `materiality', only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment." *Phillips Oil Company v. OKC Corporation*, 812 F.2d 265, 272 (5th Cir. 1987). In making its determinations of fact on a motion for summary judgment, the Court must view the evidence submitted by the parties in a light most favorable to the nonmoving party. *McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984).

The moving party has the duty to demonstrate the lack of a genuine issue of material fact and the appropriateness of judgment as a matter of law to prevail on his motion. *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117 (5th Cir. 1982). The movant accomplishes this by informing the court of the basis of its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. *Topalia*n, 954 F.2d at 1131. "Rule 56 contemplates a shifting burden: the nonmovant is under no obligation to respond unless the movant discharges [its] initial burden of demonstrating [entitlement to summary judgment]." *John*, 757 F.2d at 708. "Summary judgment cannot be supported solely on the ground that [plaintiff] failed to respond to defendants' motion for summary judgment," even in light of a Local Rule of the court mandating such for failure to respond to an opposed motion. *Id.* at 709.

However, once a properly supported motion for summary judgment is presented, the nonmoving party must rebut with "significant probative" evidence. *Ferguson v.*

National Broadcasting Co., Inc., 584 F.2d 111, 114 (5th Cir. 1978). In other words, "the nonmoving litigant is required to bring forward `significant probative evidence' demonstrating the existence of a triable issue of fact." *In Re Municipal Bond Reporting Antitrust Lit.*, 672 F.2d 436, 440 (5th Cir. 1982). While generally "`[t]he burden to discover a genuine issue of fact is not on [the] court,' (*Topalian* 954 F.2d at 1137), `Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention the court must consider both before granting a summary judgment.'" *John*, 757 F.2d at 712 (quoting *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980)).

Overall, however, all facts are to be construed and weighed in the light most favorable to the Plaintiff. *Austin v. Johnson*, 328 F.3d 204, 207-208 (5th Cir. 2003).

Here, the Defendants have wholly failed to meet their burden of production, in order to sustain their proffered motion, especially in light of the indisputable facts above. The facts set forth below further establish that the Defendants are not entitled to avoid liability.

THE ISSUES

Plainly and concisely stated, the overall issues are:

1. **What did Sheriff Rushing know, and when did he know it?**
2. **What did he then do about it, if anything?**

Sheriff Rushing, and therefore Lincoln County, propound that the sheriff had no knowledge of prior sexual assaults by Miller (except for two incidents he claims were unsubstantiated) and that, even if he knew, he did not act with "deliberate indifference." Plaintiff would admit that these two issues are the crux of the case, as it now stands before this Court. With the law,[1] also set forth below, being generally accepted by both sides, it simply comes down to determining whether a dispute lies in the facts.

It does.

FACTS ON THE FOCAL ISSUES

This Court is already well familiar with the general facts of this case in rendering its decision solely concerning the issue of qualified immunity for Rushing in his individual capacity. [Docket No. 33.] However, this litigation now stands at a different posture, and as such, additional facts have been discovered. These facts will be addressed below; yet, out of an abundance of caution, and so as to reiterate key facts which further demonstrate genuine and material disputes of facts between the parties, Plaintiff Ard would offer the following supporting facts established during discovery and otherwise

[1] Plaintiff would incorporate by reference the "Overview" section of this memorandum, in which specific reference is made to the pervasive and compelling federal law, executed by President Bush, and the resulting federal regulations and standards, the obligate Sheriff Rushing and his County to prevent prison rape and sexual assault. 42 U. S. C. Section 15601, 15606, and 15607. Even Mississippi law compels the sheriff to protect inmates. *Miss. Code Ann.* Section 19-25-69. Therefore, Sheriff Rushing is under an affirmative and all-encompassing duty to protect Amber Ard from being raped by Timothy Miller.

presented by public record.[2]

A. Multiple Versions: What's the truth?[3]

Defendant Rushing's contention regarding liability is that jailer Timothy Miller plead guilty to the crime of sexual contact with an inmate, and that Miller claims that the sexual contact with Plaintiff Amber Ard was consensual.[4] Miller's claims in this regard are highly questionable and carry absolutely no credibility. To date, Timothy Miller has provided four (4) different versions of what occurred between Miller and Amber Ard on June 12, 2010. According to the report of Mississippi Bureau of Investigation officer Troy Travis, upon questioning Miller regarding the sexual assault of Amber Ard, Timothy Miller initially denied that anything happened at all between Ard and Miller. [See Mississippi Bureau of Investigation Report, attached as Exhibit "A" to Docket No. 29.]

Upon further questioning, Miller stated that he masturbated in Amber Ard's jail cell while Ard was present. [See Exhibit "A."] Miller later changed his story a third time to Troy Travis when he stated that Amber Ard performed oral sex on Miller while in Ard's jail cell. [See Exhibit "A."] When questioned by Plaintiff's counsel in the deposition of Timothy Miller regarding his third version involving oral sex, Miller denied that oral sex occurred between Miller and Ard and gave his fourth version of the story, which is that Ard used her hand to perform a sexual act on Timothy Miller. [See pg. 21 of Deposition of Timothy Miller attached as Exhibit "B." to Docket No. 29] In the less than two (2) years since the sexual assault of Amber Ard on June 12, 2010, Timothy Miller has provided four (4) versions of what actually occurred on that date.

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[2] Plaintiff previously presented much of these facts in her previous Response to Defendant Rushing's Motion for Summary Judgment, as to qualified immunity. [Docket No. 29.] Therefore, so as to not clutter the docket with unnecessary re-submission of items already in the record and filed with this Court, all references to exhibits in this section coincide with the previously submitted exhibits, unless specifically referenced otherwise.

[3] As Aristotle observed, truth equals consistency. Thus, inconsistency must equal falsity.

[4] By law, sex with an inmate does not abrogate criminal liability. *Miss. Code Ann.* Section 97-3-104. Moreover, due to the nature of the corrections environment itself, jailer sex with inmates cannot be considered consensual. [Ex. "1" hereto.] Thus, it is utterly ridiculous and non-sense to even proffer that Miller's jailhouse rape of Ard was "consensual." Indeed, it even smacks of the very deliberate indifference espoused by Sheriff Rushing.

It is clear that absolutely no credibility should attach to Timothy Miller's testimony in this regard, and in the face of allegations by Plaintiff, Amber Ard, and witness, Sonya Smith, that Timothy Miller did indeed sexually assault them, there is a clear question of fact for the jury to determine regarding the nature of the contact between Amber Ard and Timothy Miller.

B. Sex in the Lincoln County Jail, courtesy of the Sheriff

In his Motion for Summary Judgment, Defendant Rushing claims that Amber Ard was not incarcerated under conditions posing a substantial risk of serious harm and that he did not know of any prior incidents.

It is well established through testimony and documentation that prior to Timothy Miller's sexual assault, Miller had been accused of sexual misconduct with female inmates on at least two separate occasions. In his deposition testimony, Steve Rushing stated that he was aware of allegations against Timothy Miller in 2009 that he asked a female inmate to show him her breasts. [See pgs. 10-12 of deposition of Steve Rushing attached as Exhibit "C" to Docket No. 29.]

However, Sonya Smith, a former inmate of the Lincoln County Jail, testified that she was sexually assaulted by Timothy Miller in October of 2006. [See pgs. 19-20 of Deposition of Sonya

Smith attached as Exhibit "D" to Docket No. 29.] Smith stated that Miller entered the cell, unaccompanied by a female guard, and sexually assaulted Smith after Miller had just sex with an inmate housed in the cell next to Smith. [See pgs. 21-22 of Exhibit "D".] Rushing curiously disavows any knowledge of Sonya Smith or the alleged assault on Sonya Smith in 2006. [See pg. 37 of Exhibit "C".]

Sonya Smith yet claims that she met with Rushing shortly following the sexual assault in 2006 and described the location of Sheriff Rushing's office, which is located separate from the jail, with great specificity. [See pgs. 39, 70-78 of Exhibit "D."] Indeed, the report of the Mississippi Bureau of Investigation, who investigated Miller's assault on Sonya Smith, states that MBI investigators met with Sheriff Rushing regarding Miller's assault on Smith. [See Report of Mississippi Bureau of Investigation attached as Exhibit "E." to Docket No. 29.] The same report references the statement of Ronda Bozeman, who told investigators that she personally witnessed Timothy Miller having sex with Charlie Smith, another inmate of the Lincoln County Jail. [See Exhibit "E."]

Rushing's alleged lack of knowledge of previous allegations against Timothy Miller is completely contradicted by the testimony of Sonya Smith and other documentation. Sonya Smith testified that shortly after her assault by Tim Miller, Defendant Rushing called Smith into his office to discuss the allegations against Tim Miller. [See pg. 39 of Exhibit "D" to Docket No. 29.] Smith described the area in which Rushing's office was located with great specificity. [See pgs. 70-78 of Exhibit "D" to Docket No. 29.] Records kept by the Mississippi Department of Corrections reflect that Smith told probation officer Troy Floyd about Miller's assault and Floyd immediately notified Dustin Barefield, Rushing's chief deputy. [See 11/1/2006 entry of MDOC records attached as Exhibit "F" to Docket No. 29.] Furthermore, the report of the Mississippi Bureau of Investigation, regarding Miller's assault states affirmatively that the MBI agents met with Defendant Rushing to discuss Sonya Smith's allegations. [See Exhibit "E" to Docket No. 29.] The same report also states that Defendant Rushing admits he was notified of Sonya Smith's allegations by jail employee, Krysten Butler. [See Exhibit "E" to Docket No. 29.] The same report also references allegations by other inmates that they witnessed Tim Miller having sex with other inmates.

Sheriff Steve Rushing's knowledge of the substantial risk posed by allowing Timothy Miller unfettered access to female areas of the jail is a question of fact due to the multiple contradictions between Rushing's testimony and the testimony of others and other supporting documentation.

In his deposition, Rushing claimed that he speaks to his warden, Charles Welch, on a daily basis, regarding issues at the Lincoln County Jail, and that if a discipline issue arose regarding a jailer, he would be notified of such issue. [See pgs. 6-7 of Exhibit "C," Docket No. 29.] Despite claiming such, Rushing completely disavows any knowledge of previous incidents involving Timothy Miller, although the documentation clearly shows Rushing had notice from several individuals, regarding allegations of sexual misconduct by Timothy Miller.

Rushing's claim of no knowledge regarding Sonya Smith becomes even more questionable, due to the fact that he apparently vividly remembers the allegations against Tim Miller regarding asking a female inmate to show her breasts, which Rushing describes as a rumor, yet, he has no knowledge of an allegation serious enough to necessitate an investigation by the MBI in which Rushing was personally interviewed. How can that be true?

Rushing now claims that the investigation into both of these incidents concluded that the claims were unsubstantiated, and therefore, he is absolved of liability. However, that is not the whole story, and Sheriff Rushing has been less than candid with this Court.

C. Crystal Gayle Smith: 2010 Rape

On June 22, 2012, Sheriff Rushing executed an affidavit for submission to this Court that he knew of no prior rapes of inmates in the Lincoln County Jail. [See Exhibit "F" to Defendant's Motion; Docket No. 58.] He states to this Court that he only had heard a rumor that Miller had asked a female inmate to bear her breasts to him. [Paragraph No. 11 thereto.] Contrary to that affidavit, however, he has admitted his knowledge of a 2006 incident. What Sheriff Rushing has failed to honestly state to this Court is that he is well aware of the 2010 rape of Crystal Gayle Smith at the hands of Timothy Miller; a rape he did nothing about and allowed, deliberately and indifferently, the rape of Amber Ard to occur.[5]

On August 16, 2012, Crystal Gayle Smith filed her own lawsuit against Rushing, Lincoln County and Miller, in this very same court. [Ex. "3" hereto.] Due to a recently surgery, counsel for the Plaintiff has been unable to obtain an affidavit from Crystal Gayle Smith, but pursuant to Rule 56(f) of the *Federal Rules of Civil Procedure*, hereby offers the affidavit of her attorney, Ralph Todd Willis, Jr. [Ex. "2", hereto.] The Plaintiff respectfully submits to this Court that an affidavit, directly from Crystal Gayle Smith will

[5] Indeed, the lawsuit of Crystal Gayle Smith was not disclosed by Defendants in discovery on the qualified immunity issue. Rather, Plaintiff's current counsel first discovered the suit in June of 2013. Moreover, Crystal Gayle Smith references statements she gave to Rushing and the District Attorneys of Lincoln and Pike Counties, but these statements were not produced or disclosed.

be promptly supplemented to this Response to the Defendants' motion.

According to Mr. Willis, as an officer of this Court, Crystal Gayle Smith has stated the following:

> 3. As alleged [in the Crystal Gayle Smith's Complaint], in November, 2009, Ms. Smith was an inmate at the Lincoln County Jail in Brookhaven, Mississippi. While she was walking in the hallway of the jailhouse, Deputy Timothy Miller, one of the jailers, pushed her against the wall, and kissed and groped her. She made it very clear to Miller that his sexual advances were unwelcome. About two weeks later, Ms. Smith was staying in her cell, since she was fearful that Deputy Miller would attack her again in the hallway. The other female inmates were taken out to the yard. Miller entered Ms. Smith's cell and raped her. There were no other jailers present, and no other inmates were on the floor.
>
> 4. Subsequently, and prior to June of 2010, Ms. Smith made the fact of this rape known to Sheriff Rushing, and she also gave a statement to the District Attorneys for Pike and Lincoln Counties about Miller's sexual assault on her.
>
> 5. As further alleged in the Complaint, there are no cameras in the cell where Ms. Smith was raped. There are cameras in other areas to monitor the conduct of jailers and inmates, but these cameras were not monitored to protect her safety. If there was a policy in effect at the Lincoln County Jail that no male deputies were to enter a female inmate's cell without a female jailer being present, that policy

> was not enforced and was utterly disregarded. In fact, Ms. Smith has frequently observed male deputies enter the cells of female inmates without a female jailer being present. These events happened too often for the Sheriff, Steve Rushing, not to have known about it.

[Ex. "2", Affidavit of Ralph Todd Willis, Jr., Esq., on behalf of Crystal Gayle Smith.]

The utter failure of Sheriff Rushing to candidly disclose to this Court his knowledge of Miller's rape of another female inmate, approximately six (6) months prior to Miller's rape of Amber Ard, should not be condoned by this Court by allowing him to avoid a trial on the merits in this case.

D. Known Danger to Female Inmates: No Protection

Defendant Rushing attempts to downplay the obvious and substantial danger of continuing to employ and granting access to the female areas of the jail to a jailer previously accused of sexual misconduct with female inmates by stating that the area of the jail in which Amber Ard was housed was behind "three key-locked doors." What Rushing fails to mention is that Timothy Miller, a jailer who has on four separate occasions been accused of sexual misconduct with female inmates, had the key to these "three key locked doors." [See pgs. 12-13 of Exhibit "B" to Docket No. 29.] Timothy Miller admitted that he had a key to the upstairs area in which Amber Ard was housed and that if he wanted to enter such area, he did not have to check with anyone, sign any sort of ledger or list, or obtain permission to enter such area; he only had to use his key. [See pgs. 12-13 of Exhibit "B" to Docket No. 29.] Steve Rushing also confirmed that Miller had a key to the area, and that if Miller wanted to access the female areas of the jail, there was nothing present to prohibit him from doing so. [See pgs. 18-20 of Exhibit "C" to Docket No. 29.]

Defendant Rushing next attempts to downplay the substantial danger of Timothy Miller's unfettered access to the female areas of the jail by stating that there were cameras present in the upstairs area which were monitored 24 hours a day. However, in his deposition testimony, Defendant Rushing stated that the camera in such area was only at the front door to the area in which the females were housed upstairs, and that once an individual such as Miller enters through that door, there are no further cameras in the area immediately surrounding the individual pods in which the females are housed. [See pgs. 18-19 of Exhibit "C" to Docket No. 29.] Furthermore, although it is established that Timothy Miller on several occasions entered the female area of the jail without a female escort, Defendant Rushing admits that he does not recall any instance in which a jailer was reprimanded for entering the female area of the jail without a female escort as a result of being observed on these cameras which are allegedly monitored 24 hours a day. [See pg. 20 of Exhibit "C" of Docket No. 29.]

As is apparent, the presence of a camera system neither deterred Timothy Miller from consistently accessing the female areas of the jail without a female escort nor did it ever result in the reprimand of Miller or any other employee for entering this part of the jail without female escort. As such, the protective value of such camera system is absolutely zero.

Defendant Rushing also downplays the substantial risk by stating that female officers were present and available 24 hours a day in the event Miller or ay male jailer needed to access the female areas of the jail. This contention is contradicted by the testimony of Timothy Miller, who stated that there was not always a female jailer available or present when Miller was on duty, and that there were instances in which the only jailers on-duty were male. [See pgs. 13-14 of Exhibit "B" to Docket No. 29.]

Moreover, no female jailers have been offered by the Defendants to even state that they were there and were monitoring the female inmates' cell block or Timothy Miller. In fact, on June 12, 2010, the date of Amber Ard's sexual assault, Miller testified that he was called to check the toilets in the female area of the cell, attempted to locate a female jailer to accompany him, and could not locate one. [See pgs. 14-15 of Exhibit "B" to Docket No. 29.] Miller also stated that on several occasions he brought meals to female prisoners without a female jailer escorting him because there were no female jailers available. [See pg. 15 of Exhibit "B" to Docket No. 29.]

Thus, the mere presence of Timothy Miller as a jailer of Lincoln County, an individual who had been accused on previous occasions of sexual misconduct with female inmates, combined with the completely inadequate policies or checks to prevent Miller's unfettered access to the female only areas of the jail undoubtedly created a substantial risk of harm to Amber Ard as a female inmate of the Lincoln County Jail.

E. Indifference Deliberately: Sex with Inmates? Who cares?

Regarding the issue of Rushing's deliberate indifference or disregard of the substantial risk of harm in allowing Tim Miller unfettered access to female only areas of the jail, Defendant Rushing points to the "policy" purportedly promulgated to prevent such assaults. The "policy" merely consisted of a sign posted outside of the female areas of the prison. Apart from this sign, Rushing admits in his deposition that there are no written policies or procedures given to jailers upon being hired regarding anything, including conduct with female inmates, but that Rushing is currently "updating" the policy book. [See pgs. 14-15 of Exhibit "C" to Docket No. 29.]

Timothy Miller confirmed that he received no instruction upon being hired and did not receive any policies and procedures regarding interactions with the female inmates. [See pgs. 9-12 of Exhibit "B" to Docket No. 29.]

It is indeed convenient and curious that this sign posted by Rushing was allegedly previously posted, in 2009, addressing the very behavior Timothy Miller is accused of in this civil action not only in the downstairs area, where females are normally housed, but in the upstairs area, where Amber Ard was housed on the date of her assault. Considering Defendant Rushing's testimony that the upstairs area was not used to house female inmates except for "a couple of days" while the downstairs area was being remodeled, how is that even possible? [See pgs. 8-9 of Exhibit "C" to Docket No. 29.] Although the upstairs area was not used to house female inmates when the sign was allegedly posted in 2009, apparently Defendant Rushing had the foresight to post such sign for the "couple of days", in 2010, in which the upstairs area would be used to house female inmates and in which a sexual assault of a female inmate by an unaccompanied male jailer would occur.

As stated above, apart from the sign allegedly posted, in 2009, Rushing admitted in deposition testimony that there was not an individual posted at the entrance to the female area to insure that a male jailer did not enter unaccompanied, there was no ledger to keep records of entry by male jailers and whether such jailers were accompanied, and there were no other restrictions that would have prevented Timothy Miller from accessing the female areas of the jail unaccompanied by a female jailer. [See pgs. 18-20 of Exhibit "C" to Docket No. 29.]

In his deposition testimony, Tim Miller confirms that prior to the assault of Amber Ard, he had never been reprimanded for inappropriate conduct with female inmates or for entering female areas of the jail unaccompanied by a female jailer. [See pg. 16 of Exhibit "B" to Docket No. 29.] Steve Rushing confirms that he does not recall disciplining any male jailer for entering into female only areas of the jail. [See pg. 20 of Exhibit "C" to Docket No. 29.]

Not only was Tim Miller not disciplined prior to the assault of Amber Ard for sexual misconduct with female inmates or for entering into female only areas of the cell unsupervised, but he was, unbelievably, promoted to shift supervisor, after the allegations of Sonya Smith and the allegations of asking a female inmate to show her breasts, all prior to the 2010 assault of Amber Ard. Rushing admits that Tim Miller as supervisor, "basically ran the shift" and as supervisor would only answer to Warden Charles Welch. [See pg. 18-19 of Exhibit "C" to Docket No. 29.]

With the above newly discovered evidence that Rushing categorically knew of the rape of Crystal Gayle Smith in November of 2009, then these facts warranted, at a minimum, a genuine issue arises regarding Rushing's deliberate indifference to male jailers having sex with female inmates.

Incredibly, in his deposition, Rushing stated that he did not even wait for the results of any criminal investigation of Timothy Miller to terminate his employment: not because Miller actually assaulted Amber Ard, but because Miller had violated Rushing's policy of entering a female's jail cell unaccompanied by a female jailer. [See pgs. 30-31 of Exhibit "C" to Docket No. 29.] If it is Rushing's policy to fire or otherwise discipline male jailers for entering female areas of the jail unaccompanied by a female jailer, regardless of the actual activity that occurred following the male jailer's unaccompanied entry, the question arises as to why Tim Miller was not fired or disciplined (1) for entering Ard's cell on June 10, 2010, (2) for entering Ard's cell on June 11, 2010, or (3) for entering the cell of Sonya Smith without a female escort?

Yet, Rushing's reason for not firing Miller after the rape of Crystal Gayle Smith is thus verified: Miller attacked her in the hallway. He only raped her in her cell a couple of days later.

Not only was Miller not disciplined, he was promoted to the job of shift supervisor and given keys and unfettered access to the female areas of the jail. Why did Rushing not fire Miller then? He just did not care!

F. The Deliberate Indifference Continues!

As well established, Timothy Miller plead guilty to violating Section 97-3-104 of the *Mississippi Code of 1972, Annotated*. He is therefore considered a sex offender under Section 45-33-21, *et seq*. Therefore, as a sex offender under *Miss. Code Ann.* Section 45-33-25, he must register as a sex offender for twenty-five (25) years under *Miss. Code Ann.* Section 45-33-47(2)(c)(i)(4). However, Sheriff Rushing has never arrested Miller for violating *Miss. Code Ann.* Sections 97-3-104, 45-33-23, or 45-33-33(1)(a), as he is duty-bound under Section 45-33-33(3).

This failure is absolutely true, despite the fact that Sheriff Rushing's own website does not list Timothy Miller as having registered as a sex offender. [Ex. "4", hereto.] Make no mistake, the sheriff himself claims to hide behind Miller's conviction, but yet he even to this day refuses to enforce the very laws designed to protect, not just female inmates, but females in the general public from sex offenders like Timothy Miller. With

Miller living in the same vicinity of Amber Ard, the utter and deliberate indifference for the harm and damage caused to her continues.

Summary judgment must be denied.

THE LAW

The Eighth Amendment violation is clearly conceded by the Defendants and already recognized by this Court. Therefore, the analysis of the above facts are measured by the law under the following federal statutes, as well as under the *Prison Rape Elimination Act of 2003*, 42 U. S. C. Sections 15601, *et seq.*, which certainly established further duties and obligations on Rushing and Lincoln County under the Eighth Amendment beacon.[6] Application of these fundamental principals is made through the *Fourteenth Amendment*, and through the Post Civil War Acts of 42 U.S.C. Sections 1983, 1985 and 1986.

42 U.S.C. Sections 1983, 1985 and 1986

> Every person who, under color of any statute, ordinance, regulation, *custom, or usage*, of any State ... subjects or causes to be subjected, any citizen of the United States ... to deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured in an action at law .... [Emphasis added.]

42 U. S. C. Section 1983.

As further recognized by the Third Circuit, the Defendants *personal involvement* in the above described wrongs suffices for liability purposes. *Robinson v. City of*

[6] Under this federal law and under the regulations promulgated by the United States Department of Justice, it is clear that Rushing's duties of running a jail are not just discretionary anymore; indeed, they are now mandatory.

Pittsburgh, 120 F. 3d 1286, 1294 (3rd Cir. 1997)(further recognizing that actual knowledge and acquiescence is equated with personal direction). There, of course, is no question that Rushing has acted "under color of state law." *See O'Connor v. Donaldson*, 422 U.S. 563 (1975) and *Estelle v. Gamble*, 429 U.S. 97 (1976).

42 U.S.C. Section 1985

On this claim, the Defendants only argument in response to this charge is that Amber Ard is not a member of a protected class under 42 U.S.C. Section 1985. Again, the Defendants miss the issue raised. This claim under Section 1985 is not based on discriminatory animus, though hostile animus certainly exists against Ard by the Defendants' conduct in allowing Miller unfettered and undisciplined access to Ard and to rape her, in light of Rushing's own knowledge of **four** similar incidents. Instead, Ard's claim is based upon the Defendants concerted activities in preventing Ard from discharging her right to be protected under the Eighth Amendment.

This cause of action is specifically recognized by the United States Supreme Court in *Harrison v. Garrison*, 525 U.S. 121, 125, 119 S. Ct. 489, 492 (1998), in which the defendants in that case conspired to retaliate against a witness in federal court proceedings. The Court applying 42 U.S.C. 1985(2) found that the plaintiff had a cause of action for the retaliation and intimidation visited upon the plaintiff. No class status is need for such a claim under 42 U.S.C. 1985(2).

Here, Rushing has pointed to his "agreement" by his conduct of having Deputy Hall "investigate" "rumors" and by having his warden not discipline Miller, all despite the above copious and known facts that Miller had done this to female inmates on **four** occasions. Such a conspiracy does not have to be by a written instrument, but it may be shown, as above, by the conduct of the defendant.

42 U.S.C. Section 1986

Further, the Defendants, and each of them, violated 42 U. S. C. Section 1986, inasmuch as they failed or refused to prevent the commission of the aforesaid acts of violence and harm, through the conspiracy. This federal protective statute simply follows from Section 1985 for the Defendants' actions in failing to prevent such wrongs against Amber Ard from occurring. She is is therefore entitled to the relief afforded her under 42 U.S.C. Section 1988.

Knowledge and Deliberate Indifference

Yet the real analysis comes to the issues proposed above:

1. What did Rushing know, and when did he know it, and

2. What, if anything, did he do about it?

This Court has already recognized the pertinent law regarding knowledge and deliberate indifference in its Memorandum Opinion and Order of August 30, 2012. The Plaintiff has a legal right to be protected against substantial risk of serious harm, including rape. *Payne v. Parnell*, 246 Fed. Appx. 884, 889 (5th Cir. 2007). All prison inmates are entitled to reasonable protection from such sexual assaults as suffered by Amber Ard. *Johnson v. Johnson*, 385 F. 3d 503, 532 (5th Cir. 2004).

Showing such a substantial risk of serious harm and that Rushing was deliberately indifferent to her right or need for protection provides the Plaintiff with a viable claim under Section 1983. *Lewis v. Pugh*, 289 Fed. Appx. 767, 771-72 (5th Cir. 2008). Indeed, her showing that Rushing failed to *supervise or train* Miller, that this failure caused the violation of her rights, and that this failure amounted to deliberate indifference, substantiates liability against Rushing and Lincoln County. *Id.* [Emphasis added.]

As this Court is well aware, direct or circumstantial evidence of knowledge on the part of Rushing provides the mechanism for liability. *Johnson*, F. 3d at 524. Having shown such knowledge by Rushing, especially in light of his covering up knowledge of Crystal Gayle Smith's rape six months before, certainly a question of fact then arises for trial purposes. *Id.* at 525. *See also, Farmer*, 511 U. S. at 842.

With such knowledge well-documented and with Rushing's utter refusal to act on such direct knowledge, his deliberate indifference, even to this very day, arises as a direct question of fact for a jury to decide. As noted above, federal law and regulations, espoused under President Bush's administration, compel action to ***prevent*** such sexual assaults, not to claim after the fact stupidity or a lack of recognizing the very instances of conduct by jailers prone to sexually assault female inmates. Here, however, we have more, for Rushing's very credibility in failing to disclose the rape of Crystal Gayle Smith, by the same jailer under the same circumstances (especially in light of the other purportedly "unsubstantiated rumors") gives direct rise to liability for deliberate indifference.

As the Fifth Circuit, in *Lewis v. Pugh*, specifically stated:

> [Proof] of more than a single instance of lack of supervision causing a violation of constitutional rights is required before such lack of supervising can constitute deliberate indifference. *Thompson v. Upshur County*, 245 F. 3d 447, 458 (5th Cir. 2001). Instead, the plaintiff must generally demonstrate that the ... supervisor had notice of a pattern of prior acts "fairly similar to what ultimately transpired." *Davis v. City of Richland Hills*, 406 F. 3d 375, 383 (5th Cir. 2005); see also *Thompson*, 245 F. 3d at 458.

Lewis, 289 Fed. Appx. at 772.

Are **FOUR** instances enough?

Plaintiff would respectfully submit that ***four*** instances, including the rape of Crystal Gayle Smith merely six months before Amber Ard's rape is more than sufficient, especially in light of the absolutely failure to act by Rushing. Certainly, jury questions of facts exist on these issues, based on the facts set forth above.

Summary Judgment must be denied.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff respectfully moves the Court to deny the Defendant's motion for summary judgment, in accordance with Rule 56(c) of the *Federal Rules of Civil Procedure*. Further, the Plaintiff moves the Court for such other relief, either general or specific, as the Court may deem appropriate.

RESPECTFULLY SUBMITTED, this the 1st day of November, 2013.

AMBER ARD, Plaintiff

BY: */s/ Paul A. Koerber*
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CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiff, Paul A. Koerber, does hereby certify that on this day, he served, via electronic filing with the Court, in accordance with Rule 5 of the *Federal Rules of Civil Procedure*, the above and foregoing Memorandum in Opposition to Defendants' Motion for Summary Judgment, upon the following counsel of record for the Defendants:

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